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**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

MELINDA ELLIS, individually and on behalf of all ) CASE NO. 3:09-cv-00428-LRH-WGC  
 other similarly situated )

Plaintiff, )

vs. )

**DEFENDANTS' TRIAL BRIEF**

ALESSI TRUSTEE CORPORATION; DAVID )  
 ANTHONY ALESSI; and ALESSI & KOENIG, )  
 LLC.; and DOES I through XX, )

Defendant(s). )

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2  
3 **I. BASIC FACTS OF THE CASE**

4 Plaintiff is the owner of two properties located within the Arrow Creek Homeowner's  
5 Association. Plaintiff fell behind on her HOA assessments due to alleged financial difficulties.  
6 Defendants were retained by the Arrow Creek HOA to collect the delinquent assessments  
7 through the non-judicial foreclosure process as allowed for by NRS 116.3116 et. seq.  
8

9 Plaintiff brings the instant suit asserting causes of action for (1) Civil Racketeering ; (2)  
10 Breach of Fiduciary Duty and (3) violations of the Fair Debt Collections Practices Act.

11 Essentially, Plaintiff contends that Defendants engaged in a kickback scheme in which  
12 unlawful "fees" were charged by Defendants to Plaintiff, constituting civil racketeering, and  
13 that Defendants failed to properly forward or apply monies paid by her to Arrow Creek  
14 Homeowners Association, which was a breach of Defendants' fiduciary duties. Plaintiff further  
15 claims that Defendants failed to include required language in its correspondence in violation of  
16 the FDCPA. Defendants deny these claims and assert that Plaintiff is responsible for all of the  
17 events leading up to this lawsuit due to her failure to pay her bills. Defendants further assert  
18 that all fees charged to Plaintiff were expressly allowed by law. Defendants also claim that any  
19 violations of the FDCPA are excused by the "bona fide error" defense. *See generally Reichert*  
20 *v. National Credit Systems, Inc.* , 531 F.3d 1002 (9<sup>th</sup> Cir 2007).  
21  
22

23 **II. CIVIL RACKETEERING**

24 In order to prevail on her Civil Racketeering claim, Plaintiff must prove the following  
25 elements:  
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27

- 1 (1) that the Defendants engaged in at least two crimes related to acts of
- 2 racketeering;
- 3 (2) the time, place and manner of each fraudulent act;
- 4 (3) that Plaintiff suffered causally related damages.

5 *Moore v. Kayport Package Express, Inc.*, 885 F. 2d 531, 541 (9<sup>th</sup> Cir. 1989)

6 Throughout the course of this case, Plaintiff has never been able to specifically identify  
7 any fraudulent activities conducted by Alessi & Koenig or the Alessi Trustee Corporation. This  
8 lack of proof will continue through trial. Plaintiff does not dispute that she was delinquent on  
9 her assessment obligation to the Arrow Creek Homeowner's Association. All of the collection  
10 activities engaged in by the Alessi Defendants were in full accordance with NRS 116 and the  
11 Arrow Creek CC&Rs. Plaintiff claims that her assessment payments were improperly allocated  
12 between the delinquency owed to the Association and the collection fees and costs incurred  
13 through Alesi & Koenig. Plaintiff is simply mistaken. Both NRS 116 and the CC&Rs,  
14 specifically provide that collection fees and costs are considered a form of assessments that a  
15 part of the Association's lien against delinquent homeowners. *See* Arrow Creek CC&Rs Article  
16 3, Section 11 ; NRS 116.3116(1), 3102(n). Accordingly, it was proper for Alessi & Koenig to  
17 do a pro-rata split of Plaintiff's partial payments between her delinquency to the Association  
18 and the amount she owed for collection fees and costs.

### 19 **III. BREACH OF FIDUCIARY DUTY**

20 A fiduciary relationship is a special relationship that is based on a high degree of trust  
21 and confidence. *Giles v. Glen Motors Acceptance Corp.* 494 F.3d 865 882 (9<sup>th</sup> Cir. 2007). In  
22 this case, Alessi & Koenig is a law firm that was retained by the Arrow Creek HOA to collect  
23 monies owed by Plaintiff. The relationship between Alessi & Koenig and Melinda Ellis was  
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25  
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1 strictly adversarial in nature. It was never based on any type of special trust or confidence. This  
 2 lack of a fiduciary relationship was already recognized by this Court in denying Plaintiff's  
 3 Motion for Summary Judgment:

4       Here, it is undisputed that defendants were hired by the Arrow Creek Home  
 5       Owner's Association ("HOA") to initiate lien measures and non-judicial  
 6       foreclosure activities against Ellis' properties. As such, the parties had an  
 7       adversarial rather than a fiduciary relationship.

8       Order on Plaintiff's Motion for Summary Judgment, page 3, lines 23-26 (Docket #141)

9       Thus, the Plaintiff's claim for breach of fiduciary relationship has already been  
 10       determined by this Court and Plaintiff should not be allowed to present any further evidence on  
 11       this issue at trial.

#### 12       **IV. VIOLATION OF THE FAIR DEBT COLLECTION PRACTICES ACT**

13       The Court has already granted Plaintiff's Motion for Summary Judgment on the issue of  
 14       whether the Defendants violated the FDCPA. More specifically, the Court found that  
 15       Defendants violated the Fair Debt Collection Practices Act by failing to include express  
 16       language in its correspondence with Plaintiff which identified Defendants as a debt collector as  
 17       required by the FDCPA. Defendants assert that any such violation was a result of a bona fide  
 18       and inadvertent error. Although Plaintiff claims that the Court already resolved the issue of  
 19       bona fide error, this is not the case. Plaintiff's Summary Judgment only established that  
 20       Plaintiff had carried her burden of establish a violation of the FDCPA. Defendant has the  
 21       burden of establishing that the bona fide error provisions of the FDCPA apply. *See*, 15 U.S.C (   
 22       c); *Reichert*, 531 F.3d at 1006. David Alessi, founder of the Alessi & Koenig law firm will  
 23       testify at trial that the firm has always had comprehensive procedures in place in order to  
 24       comply with all of the requisite FDCPA provisions. These procedures included:  
 25  
 26  
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- (1) a regular review of all documents for FDCPA compliance by a qualified attorney;
- (2) Bi-annual staff training on compliance with the FDCPA;
- (3) a random spot check of selected files to ensure FDCPA compliance.

These procedures were specifically designed to ensure that the notices sent to all homeowners included the necessary warning language. The fact that certain notices sent to Plaintiff may<sup>1</sup> have been missing this language is a result of legitimate and inadvertent error.

Even if Defendants are unable to carry their burden on the application of the bona fide error defense, Plaintiff will not be entitled to anything other than the minimum statutory damages. Rhetoric aside, Plaintiff does not have any competent and admissible evidence that she suffered any actual damages as a result of any of the alleged technical FDCPA violations. She certainly will not be able to establish that there was any causal connection between the alleged failure to include debt collector language and her claim for damages based on her inability to sell her property.

Dated this 19<sup>th</sup> day of January 2015.

**ALESSI & KOENIG, LLC**

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<sup>1</sup>At the time some of these letters were sent to Plaintiff, a separate insert containing the required FDCPA language was included in every envelope. It is unclear whether Plaintiff received any of these inserts. The Defendants intend to inquire of Plaintiff on this issue when she testifies.

**CERTIFICATE OF SERVICE**

I hereby certify that on the 19th day of January, 2015, I caused service of a true and correct copy of the foregoing **DEFENDANTS' TRIAL BRIEF** to be made by the Court's electronic service system:

Mark Bourassa, Esq.  
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Counsel for Plaintiff

/s/ Jona L. Lepoma  
An employee of Alessi & Koenig